Supreme Court, U.S.
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In The

Supreme Court of the United States

OFFICE OF THE CLERK

WILLIAM BRANDT, as Chapter 7 Trustee of the Estates of Plassein International Corp., et al.,

Petitioner,

v.

B.A. CAPITAL CO. LP, ANDREW MARSHALL FORSBERG TRUST, ETHEL FORSBERG REVOCABLE TRUST, JANIS RAE FORSBERG TRUST, FRANK JOHN MCCARTHY, DANIEL R. ORRIS, BERNADINE ORRIS, CHARLES J. WARR, PAUL D. GAGE, STEPHEN S. WILSON, G. KENNETH POPE, JR., KENNETH OLENLER, DANIEL A. JONES, III, SAM CHEBEIR, THOMAS F. FAY, RUTH L. FISCHBACH, MARK R. FREEDMAN, ROBERT N. ZEITLIN, SIDNEY ZEITLIN, ZFC ASSOCIATES, INC., WILLIAM G. RUSSELL, ROBERT N. ZEITLIN 1999 CHARITABLE REMAINDER UNITRUST,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 546(e) of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*)[1] provides in pertinent part that, absent actual fraud under § 548(a)(1)(A), "the trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 . . . , made by or to a . . . financial institution. . . ." Section 741(8) defines "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment *commonly used in the securities trade*." (Emphasis supplied.)

The question presented is whether the Third Circuit erred in holding that the exception provided by § 546(e) of the United States Bankruptcy Code includes a transaction that does not involve the sale or transfer of a publicly traded security and uses a financial institution solely as an intermediary for distribution of funds to selling shareholders, thereby immunizing selling shareholders in virtually every leveraged buyout from the fundamental avoidance powers granted to a trustee pursuant to § 544.

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[1] Unless otherwise indicated, references to statutes identified only by section number ("§ ___") are from the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

PARTIES TO THE PROCEEDING

Petitioner William Brandt is the Chapter 7 Trustee of the bankruptcy estates of Plassein International Corporation, Plassein International of Martin, Inc., Plassein International of Ontario, LLC, Plassein International of Salem, Inc., Plassein International of Spartanburg, Inc., Plassein International of Thomasville, Inc. and Teno Films, Incorporated (collectively with Plassein, the "Debtors"). All parties to the appeal before the United States Court of Appeals for the Third Circuit are listed in the caption, except that Respondent Kenneth Olenler is also known as Kenneth Olender.

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Petitioner William Brandt, Chapter 7 Trustee ("the Trustee"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit [App. 1-16] is reported at 590 F.3d 252 (3d Cir. 2009). The opinion of the United States District Court for the District of Delaware [App. 17-26] is reported at 388 B.R. 46 (D.Del. 2008). The opinion of the United States Bankruptcy Court for the District of Delaware [App. 27-46] is reported at 366 B.R. 318 (Bankr.D.Del. 2007).

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals was entered December 22, 2009. [App. 4]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 544(a)(1), Title 11, United States Code:

> 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.

. . .

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable under section 502(e) of this title.

Section 546(e), Title 11, United States Code:[2]

a. Limitation on avoiding powers.

. . .

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Section 741(8), Title 11, United States Code:

741. Definitions for this subchapter.

In this subchapter –

. . .

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment,

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[2] This section was amended in 2005 and 2006, but these amendments are not relevant here.

or any other similar payment commonly used in the securities trade.

STATEMENT OF THE CASE

1. **The Bankruptcy Code Grants Trustees Avoidance Powers**. Section 544 of the Bankruptcy Code (11 U.S.C. § 101, *et seq.*), the so-called "strong arm" clause, empowers a trustee to avoid transfers that would be avoidable by hypothetical or actual creditors pursuant to applicable local, non-bankruptcy law. Among the arsenal of state laws employed by trustees to avoid transactions are fraudulent transfer statutes, which generally allow a creditor to undo a transfer by a debtor that, *inter alia*, results in that debtor's insolvency or leaves the debtor with insufficient capital for business operations. This "strong-arm" power has long been a crucial part of American bankruptcy law. *See, e.g., Stellwagen* v. *Clum*, 245 U.S. 605, 614 (1918) (recognizing that "state statutes intended to avoid conveyances actually or constructively fraudulent and thereby to promote the equal distribution of insolvent estates" may be properly invoked by trustees pursuant to Section 70e of the Bankruptcy Act, the predecessor to Section 544, and fall squarely within the policy objective of bankruptcy law policy to "distribute the property of the debtor . . . fairly and equally among his creditors" and to provide the "unfortunate debtor . . . a new opportunity in life").

2. **Delaware's Fraudulent Transfer Statute.** Delaware's Uniform Fraudulent Transfer Act ("UFTA"), made applicable to this proceeding through § 544 of the Bankruptcy Code, describes those transfers that may be avoided at 6 Del. Code §§ 1304 and 1305. Section 1304, in relevant part, allows a creditor (and therefore a trustee) to avoid a transfer if it is made without receiving equivalent value and "the debtor . . . was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction." § 1304(a)(2)(a-b). Section 1305(a) allows a trustee to avoid a transfer when,

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent transfer in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation.

3. **Leveraged Buyouts Are Subject To Avoidance As Fraudulent Transfers**. In a typical leveraged buyout, the purchaser borrows funds for the acquisition by pledging or leveraging the assets of the target company to pay the selling shareholders and the holders of any existing secured debt, thus requiring the purchaser to invest little if any funding of its own. When the target company ends up in bankruptcy, a bankruptcy trustee's invocation of state

fraudulent transfer law has long been held an appropriate vehicle to contest transfers made pursuant to a leveraged buyout transaction. As the Third Circuit recognized below,

> More than 20 years ago we held that leveraged buyouts in corporate acquisitions were subject to fraudulent transfer laws. *See United States* v. *Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986). The treatment seemed appropriate because leveraged buyouts, in certain circumstances, can prejudice unsecured creditors of the acquired company by exchanging the equity in the acquired company for secured debt held by other creditors with priority claims of the unsecured creditors.

Brandt v. *B.A. Capital Co. LP (In re Plassein Int'l Corp.)*, 590 F.3d 252, 256 (3d Cir. 2009) (internal citations omitted) [App. 8-9]. *See also Boyer* v. *Crown Stock Distribution, Inc.*, 587 F.3d 787, 792 (7th Cir. 2009) ("Should the acquired company be doomed to go broke after and because of the LBO – if the burden of debt created by the transaction was so heavy that the corporation had no reasonable prospect of surviving – the payment to the shareholders by the buyer of the corporation is deemed a fraudulent conveyance because in exchange for the money the shareholders received they provided no value to the corporation but merely increased its debt and by doing so pushed it over the brink."); *Moody* v. *Security Pacific Bus. Credit, Inc.*, 971 F.2d 1056, 1073 (3rd Cir. 1992) ("At least from the viewpoint of the unsecured creditor,

leveraged buyouts present great potential for abuse. As we noted in *Mellon Bank, N.A.*, '[a]n LBO may be attractive to the buyer, seller, and lender because the structure of the transaction . . . allow[s] all parties to shift most of the risk of loss to other creditors . . .' 945 F.2d at 646 . . . therefore, we believe failed leverage buyouts merit close scrutiny under the fraudulent conveyance laws," quoting *Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635, 646 (3rd Cir. 1991)).

4. **The Safe Harbor Provision of 11 U.S.C. § 546(e).** Section 546 specifically limits avoidance powers otherwise enjoyed by a trustee pursuant to the Bankruptcy Code, including § 544. In particular, § 546(e) prohibits a trustee from avoiding certain payments peculiar to securities transactions, including "settlement payments," except in the case of actual fraud. The reach of the § 546(e) exemption is the subject of wide disagreement among the courts, *see infra* Part II, and is the question presented in this case.

5. **The Trustee's Avoidance Action**. Debtor Plassein International Corp. was formed in 1999 for the purpose of acquiring several privately held manufacturers of flexible packaging and specialty film. [App. 5, 29]. The eventual acquisitions all took the familiar form of leveraged buyouts, described above: a group of lenders agreed to advance funds and extend credit to Plassein in exchange for security interests in the target companies' assets and promises by the target companies to repay the loans, and Plassein then used those funds to acquire the stock of the target

companies and to pay off the companies' existing secured debt. [*Id.*]. The acquired companies were not merged into Plassein; instead, they changed their names but continued in operation as separate corporate entities. [App. 29].

The leveraged buyouts proceeded in two phases. On January 10, 2000, Plassein closed on acquisitions of the stock of four domestic and one Canadian company (collectively, the "January Target Companies"). [*Id.*]. As part of these acquisitions, each of the January Target Companies became jointly and severally liable for the entire debt incurred to finance the transactions, and each granted a security interest in all of its assets to secure that debt. [*Id.*].

In a separate transaction, which closed on August 15, 2000, Plassein acquired the stock of Rex International, Inc. ("Rex," together with the January Target Companies, the "Target Companies"). As a result of the Rex transaction, Rex and each of the January Target Companies became jointly and severally liable for the entire debt incurred to acquire all of the Target Companies. [App. 5, 30].

All of the shares that changed hands in these transactions were those of privately held companies with a relatively small number of stockholders. Indeed, two of the five January Target Companies shared only one stockholder. [App. 6, 27, 31-38]. With respect to each transaction, the selling shareholders received a premium for their shares, which was accounted for on the post-closing balance sheets as

"goodwill" and financed through the new debt obligations of the Target Companies. [App. 30]. As to logistics of the stock transfers, for each closing at issue in this case, the selling shareholders delivered their shares of stock directly to Plassein. [App. 6]. Plassein, in exchange, instructed Fleet Bank ("Fleet"), its lead lender, to execute a wire transfer of funds from Plassein's account to the private accounts of the various shareholders of the Target Companies. [*Id.*]. Thus, the sale of the shares to Plassein did not make use of a third-party clearing agency or the settlement system typical of securities transactions. [*Id.*].

Within months of the closings, Plassein and the Target Companies began to miss loan payments. [*Id.*]. Eventually, Plassein and the domestic Target Companies filed Chapter 11 bankruptcy petitions in the Bankruptcy Court for the District of Delaware; the Canadian subsidiary commenced an insolvency proceeding in Canada at the same time. [App. 6, 32]. After the cases were converted to liquidation proceedings pursuant to Chapter 7 of the Bankruptcy Code, Brandt was appointed trustee of all of the domestic debtors' estates. [*Id.*].

The Trustee initiated this adversary proceeding against the former shareholders of the domestic Target Companies. [App. 28]. The action, filed pursuant to 11 U.S.C. § 544 and 6 Del. Code §§ 1304 and 1305, alleges that, as a result of the substantial payout to the defendant shareholders and the concomitant increased debt service taken on by each of the Target Companies to fund that payout, each of the Target

Companies was rendered insolvent in that the sum of their debts was greater than the value of their assets at fair valuation, and each company was left with insufficient assets to operate its business going forward. [App. 5, 21, 30].

The defendant shareholders filed motions to dismiss pursuant to Fed.R.Bankr.P. 7012(b) and Fed.R.Civ.P. 12(b)(6), on the grounds, *inter alia*, that 11 U.S.C. § 546(e) rendered the transfers unavoidable.[3] [App. 28]. The shareholders argued that because the wire transfers made through Fleet as payment for their stock were "settlement payment[s] . . . made by or to a . . . financial institution," the plain language of § 546(e) applied to prevent avoidance. [App. 7].

The Bankruptcy Court, which had jurisdiction pursuant to 28 U.S.C. §§ 157(b) and 1334, allowed the motions in an Opinion and Order dated April 20, 2007, finding that the "broad application of what constitutes a settlement payment mandated in *Resorts* covers even transactions which, as here, are LBO purchases of non-public securities." *Brandt* v. *B.A. Capital Co. LP (In re Plassein Int'l Corp.)*, 366 B.R. 318, 325 (Bankr.D.Del. 2007). [App. 40]. An appeal of the Bankruptcy Court's order was timely filed with the United States District Court for the District of

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[3] The Third Circuit did not reach any issue on appeal other than those related to § 546(e). The Trustee therefore does not address any other ground for dismissal raised by either the Bankruptcy or District Court.

Delaware, which had jurisdiction to review the Bankruptcy Court's decision pursuant to 28 U.S.C. § 158(a). The District Court affirmed the Order of the Bankruptcy Court on May 15, 2008, agreeing that a "settlement payment" as used in § 546(e) is not limited to those accomplishing sale or transfer of public securities. *Brandt* v. *B.A. Capital Co. LP (In re Plassein Int'l Corp.)*, 388 B.R. 46, 49 (D.Del. 2008). [App. 24]. Upon timely appeal, the Third Circuit, exercising jurisdiction pursuant to 28 U.S.C. § 158(d)(1), affirmed the order dismissing the Trustee's complaint based solely on its earlier decision in *Lowenschuss* v. *Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505, 515 (3d Cir.), *cert. denied sub nom., Sun Int'l North America, Inc.* v. *Lowenschuss*, 528 U.S. 1021 (1999). The Court held that *Resorts*, which involved a sale of publicly traded securities, "implicitly rejected the trustee's contentions" that "settlement payments," and therefore the safe harbor granted by § 546(e), exclude transfers of privately held shares. *Plassein*, 590 F.3d at 258. [App. 14]. This petition followed.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because The Third Circuit's Reading Of Section 546(e) Is Incorrect.

The Third Circuit's insistence in *Plassein* that transactions of privately held securities in closely held businesses fall within the safe harbor of § 546(e)

ignores the plain language of §§ 546(e) and 741(8) and the purpose for which they were enacted. The decision thus immunizes a host of transactions from avoidance without advancing either the rule – application of bankruptcy law to collect and distribute the debtor's assets equitably – or the exception – to promote the stability of public financial markets.

A. The Plain Language Of Section 546(e) Restricts Its Application To Settlement Payments With Respect To Publicly-Traded Securities.

The Third Circuit, in extending its holding in *Resorts* to exempt transactions involving private securities from the Trustee's avoidance powers, misread the plain statutory language of §§ 546(e) and 741(8), opting instead for a dangerously broad interpretation that disregards the clear limitations imposed by the statutory terms.

Section 546(e) provides in pertinent part that, absent actual fraud under § 548(a)(1)(A), "the trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 . . . , made by or to a . . . financial institution. . . ." Section 741(8)[4] defines "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an

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[4] The definition of "settlement payment" that appears in § 101 applies only to the "forward contract" trade, and therefore has no relevance here. *See* 11 U.S.C. § 101(51A).

interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." The final clause of § 741(8) – "commonly used in the securities trade" – is key. As one court held, "[t]he 'securities trade' in this statutory context plainly means the public securities markets." *Official Comm. of Unsecured Creditors of Norstan Apparel Shops, Inc.* v. *Lattman (In re Norstan Apparel Shops, Inc.)*, 367 B.R. 68, 76 (Bankr.E.D.N.Y. 2007).

The Code's definition of "settlement payment" was added as part of the same 1982 package of amendments that added § 546(e) to the Code. *See* Pub. L. 97-222, § 8, 96 Stat. 235 (1982).[5] That definition has been consistently recognized by reviewing courts as "circular and cryptic" because it contains within it the very term it purports to be defining. *Zahn* v. *Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1988). *See also, e.g., QSI Holdings, Inc.* v. *Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545, 549 (6th Cir. 1999), *cert. denied*, 130 S.Ct. 1141 (2010); *Kaiser Steel Corp.* v. *Charles Schwab & Co., Inc.*, 913 F.2d 846, 849 (10th Cir. 1990) (noting that the definition in § 741(8) is "somewhat circular"); *ALFA, S.A.B. de C.V.* v. *Enron*

[5] The definition has been amended once since its enactment. The original version read "'settlement payment' means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, or any other similar payment commonly used in the securities trade." Pub. L. 97-222, § 8, 96 Stat. 235 (1982). A subsequent amendment added "a final settlement payment."

Creditors Recovery Corp. (In re Enron Creditors Recovery Corp.), 422 B.R. 423, 429 (S.D.N.Y. 2009) ("It cannot be doubted that the definition of 'settlement payment' in section 741(8) of the Code is unhelpfully circular: the term is defined with reference to itself . . . "); *Kipperman* v. *Circle Trust F.B.O. (In re Grafton Partners)*, 321 B.R. 527, 538 (B.A.P. 9th Cir. 2005) ("The difficulty with the definition of 'settlement payment' is that it relies on a conclusory laundry list of securities industries terms of art that contain the words 'settlement payment' without articulating the elements of a settlement payment"); *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 B.R. 655, 663 (N.D.Ill. 1991); *Norstan*, 367 B.R. at 76; *QSI Holdings, Inc.* v. *Alford*, 382 B.R. 731, 739 (W.D.Mich. 2007) ("[l]ooking to the § 741(8) definition of 'settlement payment,' it is beyond dispute that the statute lacks sufficient definition to determine precisely what constitutes a 'settlement payment' in any specific context"); *Kapila* v. *Espirito Santo Bank (In re Bankest Capital Corp.)*, 374 B.R. 333, 345 (Bankr.S.D.Fla. 2007); *Buckley* v. *Goldman, Sachs & Co.*, No. 02-CV-11497-RGS, 2005 WL 1206865, *6 (D.Mass. May 20, 2005) ("Unfortunately, the definition of 'settlement payment' referenced by § 546(e) sheds little light on exactly what Congress intended the exception to include"); *Walsh* v. *The Toledo Hospital (In re Financial Mgmt. Sciences)*, 261 B.R. 150, 154 (Bankr.W.D.Pa. 2001) ("This 'definition' is unilluminating in that the *definiendum* appears as a term in the *definiens*.").

In order to give this definition some content, courts have focused on the definition's final clause – "any other similar payment commonly used in the securities trade." "Whatever else a settlement payment may be, it is *restricted to the securities trade* and must be 'commonly used.'" *Grafton Partners*, 321 B.R. at 538 (emphasis added); *see also, e.g., Kaiser Steel Corp.* v. *Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230, 1237 (10th Cir. 1991) ("The clear aim of the definition is to encompass all 'settlement payments' commonly used *in the securities trade*.") (emphasis added), *cert. denied*, 505 U.S. 1213 (1992); *Norstan*, 367 B.R. at 76 ("The definition of 'settlement payment' . . . is saved from complete circularity by the concluding phrase, 'or any other similar payment commonly used in the securities trade.' It is therefore important to give meaning to this modifying language, because in its absence, the statutory definition contained in § 741(8) would be, in effect, a meaningless tautology."). Failure to give content to the term "the securities trade" in § 741(8) would violate the basic canon of statutory construction that courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous. *See United States* v. *State of Alaska*, 521 U.S. 1, *reh'g denied*, 521 U.S. 1144 (1997); *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

The term "the securities trade" in § 741(8) is not defined, but is best read as referring to the industry

dealing in publicly traded securities. "Trade," when used as a noun (as it is in § 741(8)), means "the business of buying and selling or bartering commodities" and is synonymous with "business" or "market." Merriam-Webster's Collegiate Dictionary 1246 (10th ed. 2001). *See also* Black's Law Dictionary 1529 (8th ed. 2004) (defining "trade" as "the business of buying and selling or bartering goods and services"). Thus, the "securities trade" means, essentially, the "securities business" or "securities market," and naturally refers only to the "business of buying and selling" publicly traded securities, since there is by definition no organized "market" for securities that are not available to the public.

Further support for this reading of "securities trade" comes from the fact that § 546(e), in addition to exempting "settlement payments" from avoidance, also exempts "margin payments," defined in § 741 as payments "commonly known to *the securities trade* as original margin, initial margin, maintenance margin, or variation margin, or as a mark-to-market payment, or that secures an obligation of a participant in a securities clearing agency." § 741(5) (emphasis added).[6] These terms have no meaning outside the

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[6] "Securities clearing agency" is a defined term meaning "person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3a(12) of such Act for the purposes of such section 17A." § 101(48).

markets for publicly traded securities, as is evident from the securities industry's definitions of several terms relating to margins and margin payments, all of which depend on the notion of a current "market value" for a particular security. For example, "margin" is measured "by the ratio between the customer's equity and the current market value of the purchased securities," Munn *et al.*, Encyclopedia of Banking & Finance 640 (9th ed. 1991); to "mark to the market" means to "adjust the valuation of a security or portfolio to reflect current market values," Downes & Goodman, Dictionary of Finance and Investment Terms 327 (4th ed. 1995); "minimum maintenance" is the level of equity that must be maintained in a margin account as measured by "the market value of eligible securities long or short in customers' accounts," *id.* at 334; and a "margin call" is a demand by a broker for additional security or partial payment "in order to offset or make good a loss in the value of the collateral due to a decline in the market price of securities pledged," Munn *et al.*, *supra*, at 644. Further, the term "margin security," which refers to the types of securities that may be bought and sold in margin accounts, is defined to include only securities that trade in public markets. Downes & Goodman, *supra*, at 321-322 (listing four types of publicly traded securities). None of these definitions can be sensibly applied to securities that are not publicly traded.

The term "the securities trade" in § 741(5) therefore must refer specifically, and only, to the industry that deals in publicly traded securities. Sections

741(5) and 741(8) were enacted simultaneously, *see* Pub. L. 97-222, § 8, 96 Stat. 235 (1982), so the usual rule that identical words in the same statute have the same meaning applies with particular force here. *See, e.g., Sorenson* v. *Secretary of the Treasury,* 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning," quoting *Helvering* v. *Stockholms Enskilda Bank,* 293 U.S. 84, 87 (1934)). The definition of "margin payment" thus provides further evidence that the term "the securities trade" in § 741(8) limits the definition of "settlement payment" to transactions in publicly traded securities.

Finally, as one recent commentator has argued, the very placement of the definition of "settlement payment" in the subsection of the Bankruptcy Code entitled, "Subchapter III – Stockbroker Liquidation," underscores that payments defined by § 741(8) are meant to be associated with transactions in publicly traded securities. Robert G. Richardson, *Unsettled "Settlement Payments" in § 546(E)*, 27 Am.Bankr.Inst.J. 12, 44, April 2008 (noting that placing the definition of settlement payment in the section addressing liquidation of stock brokerages rather than in the general definitional § 101 is "presumably for a purpose").

In sum, "in order to be encompassed in the statutory definition of 'settlement payment,' a transaction must involve the public securities markets." *Norstan*, 367 B.R. at 76. The plain language of §§ 741(8) and 546(e) thus resolves this case, and the Third Circuit erred in finding otherwise.

B. The Legislative History Of Section 546(e) Confirms That It Was Intended To Apply Only To Publicly Traded Securities.

The Third Circuit erroneously held that the plain meaning of § 546(e) encompasses transactions involving nonpublic securities, therefore making resort to the legislative history unnecessary. However, "'the meaning of statutory language, plain or not, depends on context.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)); *see also Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 234 (2008) (referring to the "longstanding recognition that a single word must not be read in isolation but instead defined by reference to its statutory context"). The legislative history and the intent of Congress in drafting § 546(e) are remarkably clear in their limitation of its reach to publicly-traded securities, and therefore confirm the plain meaning argument set forth *supra* Part I-A.

To understand why § 546(e) should have no application here, it is necessary first to consider why that section – which exempts a large number of transactions from the trustee's normally broad avoidance powers – appears in the Bankruptcy Code at all. Section 546(e) was introduced into the Code in 1982 as part of Pub. L. 97-222, 96 Stat. 235 (1982), which was "a package of amendments designed to protect the carefully-regulated mechanisms for clearing trades in securities and commodities in the public markets from dysfunction that could result from the automatic stay and from certain trustee avoiding powers."

Grafton Partners, 321 B.R. at 532-533. Those "carefully-regulated mechanisms," known as the "clearance and settlement system," are the means by which virtually all trades in public securities are accomplished. The system works roughly as follows:

> [T]ypically, when a customer wishes to buy a security, he or she places an order with his or her broker, who purchases the security from another broker, who is acting on behalf of a party who has placed an order to sell. Once the trade has been agreed upon, the process by which the security is delivered in exchange for the purchase price is known as "clearance and settlement." The clearing agency compares the trades its member brokers have made to arrive at an accounting of the day's transactions, which it then uses to establish each broker's money and securities settlement obligations. Finally, the trades are "settled" – funds and securities are delivered in satisfaction of the obligations.
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> One of the keys to the success of this system is that each participant in the chain guarantees that he or she will make good on his or her obligation. The buying broker guarantees that he or she will deliver funds in exchange for the securities. The selling broker guarantees he will deliver the security in exchange for funds. Because the comparison and settlement process is not instantaneous, however, the clearing agency must guarantee to the seller that it will deliver the funds, and it must also guarantee to the buyer that

> it will deliver the securities. In the event of a default by any party in the chain, the clearing agency must still make good on its guarantee, which it can do by calling on a backup clearing fund provided by its members. Brokers and other intermediaries require collateralization of their respective risks by means of various types of margin payments. This system depends upon the availability of the respective guarantees to the clearing agency; without them, the potential exposure is tremendous.

Garfinkel, Note, *No Way Out: Section 546(e) Is No Escape for the Public Shareholder of a Failed LBO*, 1991 Colum.Bus.L.Rev. 51, 64-65 (1991) (footnotes omitted) (citing, *inter alia*, Congressional hearings on the need for the 1982 amendments) [hereinafter "Garfinkel"]. *See also, e.g., Pearl Brewing Co.*, 952 F.2d at 1238 n.4 (describing the system of interrelated guarantees and margin payments); *Zahn*, 218 B.R. at 675-676 (same; citing Garfinkel); *Wieboldt*, 131 B.R. at 663-664 & nn. 9-10 (same; citing Garfinkel). The system of interdependent guarantees and margin payments gives rise to the danger a bankruptcy could pose to the affected market:

> If the pre-bankruptcy trades by a bankrupt intermediary could be set aside, then the guarantees that allow the system to function would be threatened, the parties could not proceed with confidence, and a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry.

Zahn, 218 B.R. at 676. *See also* Garfinkel, *supra*, at 65 ("If the trustee can recover as a preference, or avoid as a fraudulent conveyance, any of the types of payments that are used to secure the obligations of the market participants – and minimize the risk for the clearing agency – one participant's bankruptcy might trigger a ripple effect that spreads throughout the securities industry. In order for the system to work smoothly, the parties must be able to assume that the margin and settlement payments are valid, and will not be subject to subsequent attack.").

In light of these concerns, Congress concluded that the protections already present in the 1978 version of the Code for the commodities market should be extended to the public securities market. The legislative history explains the purpose of the 1982 amendments:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market.
>
> . . .
>
> The thrust of several of the amendments . . . is to clarify and, in some instances, broaden the commodities market protections and

> expressly extend similar protections to the securities market.

H.R. Rep. No. 420, 97th Cong., 2d Sess., at 1-2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583. With respect to § 546(e), the legislative history explains:

> Section 546([e]), together with provisions of section 548, prohibits a trustee from avoiding a transfer that is a margin payment to a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization, except where the transfer was made with intent to hinder, delay, or defraud other creditors and was not taken in good faith.

Id. at 3, 1982 U.S.C.C.A.N. at 585. From that passage, Congress' intent could hardly be clearer – as one district court has observed, "[t]he object that Congress sought to accomplish by enacting § 546(e) was to protect the operation of the *security industry's clearance and settlement system.*" *Buckley*, 2005 WL 1206865, at *7 (emphasis added).

Of course, the clearance and settlement system operates only with respect to securities that are publicly traded. *See, e.g., Grafton Partners*, 321 B.R. at 532-533; Munn *et al.* (showing flow chart of clearance and settlement system as part of definition of "securities markets" that refers only to public markets). There is, therefore, no indication in the legislative history that Congress saw any need to exempt from

avoidance payments with respect to transfers of privately-held stocks.[7]

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[7] Notably, in *Bevill, Bresler & Schulman Asset Mgmt. Corp.* v. *Spencer Sav. & Loan Ass'n*, 878 F.2d 742 (3d Cir. 1989), which was the first appellate case to grapple with the meaning of "settlement payment" in § 741(8), the Third Circuit relied heavily on legislative history. *Id.* at 746-747 ("we are fortunate that there is substantial legislative history to assist us in ascertaining the intent of Congress"). The *Bevill* court analyzed settlement payments in a context quite different from a leveraged buyout, namely whether a trustee could avoid delivery of certain securities allegedly in "settlement" of repurchase ("repo") agreements, which were exempt from avoidance under § 546(f). In holding that the delivery of securities in conjunction with a repo was a "settlement payment," the Third Circuit was persuaded that Congress intended to protect such payments and deliveries because to do otherwise would result in impairment of "the federal government's ability to finance the public debt at cost effective rates of interest" and of achieving "monetary policy objectives." The Third Circuit in *Bevill* unquestionably tied the legislative intent in providing a safe harbor for settlement payments to the grand scale effect that avoidance would have on *public* finance. However, when subsequently deciding *Resorts*, the Third Circuit turned a blind eye to the congressional intent motivating the adoption of the 1982 amendments (which included § 546(e)) and merely plucked from *Bevill* the notion that settlement payments should be interpreted broadly, stating only that "[o]ur prior recognition that the definition is extremely broad indicates that it is likely to encompass the instant transaction." *Resorts*, 181 F.3d at 515. That the Third Circuit abandoned its earlier analysis of legislative intent of § 741(8) in *Bevill* undermines the holdings in both *Resorts* and *Plassein*, as well as those jurisdictions relying on *Resorts* for similarly uninformed determinations of plain meaning. *See, e.g., Contemporary Indus. Corp.* v. *Frost*, 564 F.3d 981, 985 (8th Cir. 2009) (citing *Resorts* for the proposition that settlement payments broadly include any payment that completes a securities transaction);

(Continued on following page)

Section 555, included in the same package of amendments enacted along with §§ 546 and 741 as part of the Bankruptcy Code Amendments of 1982, Pub. L. 97-222, is further evidence that the legislature intended these amendments to protect *public* securities markets by affording them protection from avoidance and stay powers otherwise granted to the trustee by the Code. Section 555 creates an exception to the general "automatic stay" rule codified at § 365(e)(1) prohibiting a party to a contract with the debtor from terminating or modifying the contract because of the debtor's bankruptcy. Instead, under § 555, a stockbroker, financial institution or securities clearing agency (and since October 17, 2005, a financial participant) may exercise a "contractual right" to accelerate or terminate a securities contract with a debtor despite the automatic stay, unless otherwise required by a court order that "is authorized under the provisions of the Securities Investor Protection Act of 1970 [SIPA] or any statute administered by the Securities and Exchange Commission." When section 555 was enacted in 1982, "contractual right" was defined to include rights articulated by "a national securities exchange, a national securities association or a securities clearing agency."[8] Section 555, one of

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QSI Holdings, 571 F.3d at 549 (citing *Resorts*, noting "courts have recognized that the definition [of settlement payment] is 'extremely broad' ").

[8] The definition was subsequently enlarged by the Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 907(o)(7)(B), 119 Stat. 23 (2005).

the few sections of the statutory safe harbor scheme related solely to securities, tellingly tied the rights it conferred explicitly to the SIPA and securities laws – parameters that plainly implicate *public* securities markets.

> The key provision was the creation in 11 U.S.C. § 555 of a power for a stockbroker or securities clearing agency to exercise a contractual right to liquidate a securities contract – including a right set forth in a rule or bylaw of a national securities exchange, national securities association, or securities clearing agency – that could only be limited in a bankruptcy case if authorized under the Securities Investor Protection Act ("SIPA") or a statute administered by the SEC.

Grafton Partners, 321 B.R. at 532-533 (footnotes omitted). Section 546(e), as part of the same statutory scheme, warrants the same limitations on a trustee's avoidance powers.

This Court has emphasized that it has "reserved 'some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute,'" *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quoting *Commissioner* v. *Brown,* 380 U.S. 563, 571 (1965) (internal quotation omitted)). As explained *supra*, the Court need not resort to that principle here, because the plain meaning of section 546(e) and the statutory scheme of which it is a part restrict its operation to

transactions involving public securities markets. But even if the Third Circuit were correct that the literal meaning of "settlement payment" in section 741(8) encompasses any payment made in exchange for any security, to extend the "settlement payment" exception in § 546(e) to transactions involving private securities would produce an unintended, if not absurd, result.

Typically, participants in an leveraged buyout who may be pursued by a trustee for fraudulent conveyances include acquirers, lenders, shareholders and investment bankers. *Moody,* 971 F.2d at 1059, 1061-1062 (bankruptcy trustee brought fraudulent conveyance claims "to set aside advances made and obligations incurred" in connections with an LBO, naming selling entities, lender and acquiring investors as defendants); *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Delaware, Inc.* v. *Fleet Retail Finance Group (In re Hechinger Inv. Co. of Delaware, Inc.)*, 274 B.R. 71, 75 (D.Del. 2002). If § 546(e) operates to hold harmless sales of privately held stock, shareholders in privately held companies will be fortuitously omitted from the list of transferees subject to fraudulent conveyance claims, without any corresponding benefit to the stability of public markets – the very consideration behind the Congressional expansion of § 546(e). As a result, an enormous number of transactions will be immunized from avoidance, thereby profoundly undermining the trustee's long-standing strong-arm power, for no apparent reason.

To further illustrate the folly of including transfers of privately held stock among those transactions that Congress intended to exempt from avoidance by enacting § 546 – if an acquiring entity, like Plassein, had paid the selling shareholders directly in cash rather than using Fleet to distribute payments, Section 546(e), which requires that a settlement payment be made "by or to" a "financial institution," would not apply. The Trustee would have been able to pursue the selling shareholders for these cash payments. This hypothetical makes clear that Congress did not intend categorical protection of all selling shareholders or the payments made for their shares, but instead meant specifically to protect an intermediary, and only when that protection had consequences, namely, exempting a clearing and settlement system engaged in the buying and selling of public securities (which often includes third-party guaranties of such payments, *Plassein*, 590 F.3d at 255 n.1 [App. 6]) from the possibility of systemic disruption that might result if a trustee were able to reverse a large-scale sale of public securities.

In sum, Congress's intention to apply § 546(e) to transactions of publicly traded securities is manifest in the legislative history, and is consistent with common sense – the trustee's avoidance powers are traditionally broad and should not be abrogated absent a compelling reason. Unwinding transactions of nonpublic securities presents no threat to financial markets and therefore provides no such compelling

reason. Congress expressly defined the terms "settlement payment" and "margin payment" only as those terms are used in "the securities trade," *i.e.*, the industry that deals in publicly-traded securities. Section 546(e) therefore has no application where only privately held stocks are involved.

II. Review Is Warranted Because The Divergent Interpretations Of Sections 546(e) & 741(8) By The Circuit And Lower Courts Have Left A Wake Of Inconsistency As To The Important Avoidance Powers Available To Bankruptcy Trustees.

The Third Circuit has held that the plain meaning of §§ 546(e) and 741(8) definitively excludes transactions in leveraged buyouts that require the transfer of securities, whether privately or publicly held, from a trustee's traditional avoidance powers. However, the Eleventh Circuit has found to the contrary where a financial institution is merely a conduit for the transaction, and the Sixth and Eighth Circuits have adopted an approach that leaves open the possibility that a transaction involving privately-held securities may not be avoidable depending on the size and potential impact on the markets of avoidance. Furthermore, the Bankruptcy Appellate Panel in the Ninth Circuit and numerous District and Bankruptcy Courts are directly at odds with the Third Circuit, holding that Congress never intended to extend § 546's safe harbor to private transactions, and hence refusing to do so. Given the divergent holdings, this Court's definitive pronouncement on

the extent to which § 546(e) limits the trustee's avoidance powers is particularly important in light of the present economic landscape, where nontraditional financial transactions will increasingly present themselves to Bankruptcy Courts, seeking the shelter of this statutory safe harbor.

The Third Circuit in *Plassein* has taken the hardline position that the plain language of §§ 546 and 741(8) unequivocally extends to leveraged buyouts where privately held stock is acquired. 590 F.3d at 258-259 (rejecting the Trustee's attempt to distinguish transactions of nonpublic securities from those that are included in § 546(e)). [App. 13-16]. Rather than conduct an analysis of whether the statutory language or legislative history compelled a different result for private securities, the Third Circuit considered only whether there was any reason to depart from its holding in *Resorts,* which reviewed § 741(8) in the context of a leveraged buyout of a public company. It concluded there was not. *Id.* at 259 ("We will not ignore the plain language [in *Resorts*] which governs the present dispute."). [App. 15]. Instead, the Third Circuit enlarged its already expansive view of a settlement payment announced in *Resorts* to include the nonpublic transactions in *Plassein*, without considering the legislative policy objective of either section at all.

The Eighth Circuit followed suit in large measure. *Contemporary Indus. Corp.* v. *Frost,* 564 F.3d 981 (8th Cir. 2009). Confining its analysis to the plain wording of the statute, the Court stated that the

phrase referring to payments "commonly used in the securities trade" is "most naturally read as a catchall phrase intended to underscore the *breadth* of the § 546(e) exemption." *Id.* at 986 (emphasis in original). While the *Contemporary Industries* court's review included little original analysis of legislative intent, it did examine whether its statutory reading lead to "an absurd result in this case," an exercise that required an implicit recognition of legislative purpose of the statute. *Id.* at 987. In doing so, it concluded in cursory fashion that the $26.5 million at issue in the trustee's fraudulent conveyance claim *"could"* impact national financial markets because some portion *might have been* reinvested in those markets by the shareholders, which it thought explained "why Congress might have thought it prudent to extend protections to payments such as these."[9] *Id.* However, the Eighth Circuit supplied no evidence that Congress ever actually considered such an attenuated chain of events. And, indeed, the available evidence of congressional intent is precisely to the contrary, as explained *supra*. Aside from its rather strained syllogism, the Eighth Circuit's approach leaves the door open to exclude a transaction where there is not "so much money at

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[9] Even accepting the Eighth Circuit's assumption that some portion of $26.5 million would be reinvested in public securities, given the volume of securities traded on public exchanges on a daily basis, the impact of such a loss to any public securities market would be of questionable significance, never mind one of such dire consequence that would inspire Congress to exempt such a transaction from a trustee's usual avoidance powers.

stake" or where a trustee can demonstrate that there would be no impact on "the nation's financial markets," from application of § 546(e), a marked departure from the Third Circuit's bright-line conclusion. *Id.*

The Sixth Circuit focused on this last point in *QSI Holdings, Inc.* v. *Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545, 550 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1141 (2010), also adopting an evaluative approach in the course of holding that, "[t]he value of the privately held securities at issue is substantial and there is no reason to think that unwinding that settlement would have any less of an impact on financial markets than publicly traded securities." *Id.* (citing *Contemporary Industries*).[10] While the Sixth Circuit recognized "that other courts have reached different conclusions," it extended § 546(e) to the nonpublic securities transaction before it, noting that "value of the privately held securities is substantial." *Id.* However, rather than adopt a *Plassein*-like categorical rule excluding transactions involving nonpublic securities from § 546(e)'s safe harbor, the *QSI Holdings* court's analysis focused on the magnitude of the transaction and therefore its likely ability to induce market volatility. *Id.* (distinguishing *Norstan* (holding that § 546(e) did not apply) from the "instant case" because *Norstan* "involved the two sole

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[10] The shareholders received $111.5 million in cash in exchange for their stock, as well as stock in the new company. *QSI Holdings*, 571 F.3d at 548.

shareholders of a closely held Subchapter S corporation" and "did not implicate public securities markets"). In adopting an impact-based, case-by-case application of § 546(e), then, the Sixth Circuit's position is also at odds with the Third Circuit.

Taking an entirely different tack, the Eleventh Circuit in *Munford* v. *Valuation Research Corp.*, 98 F.3d 604 (11th Cir. 1996), *cert. denied*, 522 U.S. 1068 (1998), determined that payments to shareholders of a public company, although qualifying as "settlement payments" as defined by § 741(8), nonetheless did not find refuge § 546(e)'s safe harbor because the transfer, in its view, was not "made by or to a . . . financial institution," despite the involvement of a bank in completing the exchange of stock for funds. *Id.* at 610. Because the bank was merely "an intermediary or conduit" that "never acquired a beneficial interest in either the funds or the shares," it could not be considered a "transferee" to which an exemption could apply. *Id.* Rather, the real transferees were the shareholders, which have no claim to § 546(e)'s safe harbor. *Id.* ("And, of course, section 546(e) offers no protection from the trustees [sic] avoiding powers to shareholders . . . "). *Munford's* holding, then, is blind to the private or public nature of the transfer, but instead concludes that the fortuitous involvement of a financial institution as a conduit for funds is not enough to shield the ultimate recipients – the shareholders –

from the trustee's avoidance powers.[11] However, the Eleventh Circuit's position has been rejected by the Third, Sixth and Eighth Circuits. *See, e.g., Plassein*, 590 F.3d at 257-258 [App. 12-13]; *Resorts*, 181 F.3d at 516; *QSI Holdings*, 571 F.3d at 550-551; *Contemporary Industries*, 564 F.3d at 986-987.

While the Tenth Circuit's 1991 opinions in *Kaiser Steel Corp.* v. *Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230 (10th Cir. 1991), *cert. denied*, 505 U.S. 1213 (1992) (holding that § 546(e) extends to payments to shareholders in the course of a leveraged buyout) and *Kaiser Steel Corp.* v. *Charles Schwab & Co., Inc.*, 913 F.2d 846 (10th Cir. 1990) (same with respect to a stockbroker, receiving payments on behalf of its customers), are often cited for support by courts extending the purview of § 546(e) to stock purchases in private companies, *see, e.g., Plassein,* 590 F.3d at 258; *Contemporary Industries*, 564 F.3d at 985; *QSI Holdings*, 571 F.3d at 549, these cases concerned publicly held companies and held only that "[g]iven the wide scope and variety of securities transactions, we will not interpret the term 'settlement payment' so narrowly as to exclude the exchange of stock for consideration in an LBO." *Pearl Brewing Co.*, 952 F.2d at 1239. *Accord, Charles Schwab & Co., Inc.*, 913

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[11] In addition to *Munford* in the Eleventh Circuit, a bankruptcy court in the Southern District of Florida determined that a payment made by a factoring company to a bank was not protected from avoidance pursuant to § 546(e) because it "did not involve the utilization of public markets or publicly traded securities." *Kapila*, 374 B.R. at 346.

F.2d at 848. Notably, the court's rationale in *Pearl Brewing* for its interpretation was in part the fact that, "as the SEC as emphasized, this holding is supported by Congress' policy of promoting the health of the clearance and settlement system, which by all accounts is one of the fundamental aims of the 546(e) exemption." 952 F.2d at 1240 n.10. However, the Tenth Circuit has not squarely faced the question whether section 546(e) exempts transactions in privately-held securities from avoidance.

The Ninth Circuit has passed only on the application of § 546(e) to a transaction involving repurchase agreements for securities that were traded publicly, holding that it does apply. *Jonas* v. *Resolution Trust Corporation (In re Comark)*, 971 F.2d 322, 326 (9th Cir. 1992) ("[a] settlement payment clearly includes a transfer of securities that completes a securities transaction"). Fifteen years later, however, the Bankruptcy Appellate Panel for the Ninth Circuit refused to extend *Comark*'s holding to a preference action involving a Ponzi scheme entailing nonpublic and illegally unregistered securities. *Grafton Partners*, 321 B.R. at 528-529. Quite convincingly, the BAP analyzed the legislative history, statutory construction and prior decisions (distinguishing *Comark*) to conclude that however the meaning of settlement payments, there are limits and "[t]he boundary that emerges from such [prior] decisions approximates the line between public transactions that involve the clearance and settlement process and non-public transactions that do not involve that process." *Id.* at

539. The BAP's decision is thus inconsistent with the decisions of the Third, Sixth and Eighth Circuits.

The Second Circuit Court of Appeals has not squarely faced the issue presented here, but lower courts in that circuit have also reached disharmonious decisions on the safe harbor provision. In 2007, the Bankruptcy Court for the Eastern District of New York denied a motion to dismiss in a leveraged buyout case against the debtor's former shareholders, declaring no refuge in § 741(8) because the stock in the buyout was privately held ("the modifying phrase at the end of § 741(8) must be understood, at a minimum, to mean that in order to be encompassed in the statutory definition of 'settlement payment,' a transaction must involve the public securities markets."). *Norstan*, 367 B.R. at 76. Subsequently, in the wake of Enron's collapse, courts of the Southern District of New York re-examined § 546(e)'s safe harbor as it may apply to an unconventional redemption of commercial paper prior to maturity. *See Enron Creditors Recovery Corp.* v. *J.P. Morgan Securities, Inc. (In re Enron Creditors Corp.)*, 407 B.R. 17 (Bankr.S.D.N.Y. 2009); *ALFA, S.A.B. de C.V.* v. *Enron Creditors Recovery Corp. (In re Enron Creditors Recovery Corp.)*, 422 B.R. 423 (S.D.N.Y. 2009). While the Bankruptcy Court determined that the redemptions at issue, *inter alia*, did not come under the umbrella of a "settlement payment" because their use could not be described as "common" for purposes of § 741(8), 407 B.R. at 31, the District Court disagreed and ordered the dismissal of the

preference case. 422 B.R. at 442 ("Section 546(e) says [the transfers] cannot be avoided because they are settlement payments, which are payments made in the securities trade to consummate securities transactions. That is the end of the matter . . . ").[12]

The lower courts of the First and Seventh Circuits have taken a more restrictive view of the safe harbor granted by §§ 546(e) and 741(8), finding that transactions properly saved from avoidance claims must implicate a recognized clearance and settlement system. *See Wieboldt*, 131 B.R. 655 (because shareholders in a leveraged buyout received payment through an intermediary that was not involved in the clearance and settlement process, those payments were not barred from recovery by § 546(e)); *Zahn*, 218 B.R. at 676 (finding no safe harbor: "[t]he only possible link between this transaction and the securities industry is the fact that securities were sold; however, the stock at issue was not even publicly traded. The stock transfers thus had no connection whatsoever to the clearance and settlement system, and allowing avoidance would have no impact at all on that system."); *Brandt* v. *Hicks Muse & Co., Inc. (In re Healthco Int'l, Inc.)*, 195 B.R. 971, 983 (Bankr.D.Mass. 1996) ("The payment [here] was a one-time distribution in complete liquidation of its stock interest. These circumstances, particularly where there is no

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[12] The electronic docket for the United States District Court for the Southern District of New York indicates that the District Court's decision has been appealed.

showing of a guaranty by a securities clearing agency, are not what Congress had in mind in enacting section 546(e)"); *Buckley*, WL 1206865 at *7 ("The object that Congress sought to accomplish by enacting § 546(e) was to protect the operation of the security industry's clearance and settlement system. That interest is not furthered in any meaningful sense by bringing an LBO like the one at issue in this case under the exemption of § 546(e) simply because funds fortuitously passed through financial institutions on their way into the hands of the defendants."). These holdings bear no resemblance to those in other circuits proclaiming the "broad sweep" of § 546(e).

Section 546(e) has unquestionably inspired broad and varied jurisprudence, which begs for resolution. Based on the present state of the law, a trustee seeking to avoid, as a fraudulent transfer, payments as part of a leveraged buyout to shareholders of a closely held, nonpublic company, as the trustee did in this case, will face radically different results in different Circuits: his action will be barred by § 546(e) in the Third Circuit; he might be able to pursue his claims in the Sixth or Eighth Circuit, if the transaction is small enough to avoid causing some undefined degree of upset in a national financial market; and his action will be allowed go forward in the Eleventh Circuit if the financial intermediary employed is merely involved as a conduit and has no beneficial interest in the transfer. In other circuits, a variety of lower-court decisions having some persuasive value but little uniformity add to the confusion.

The Third Circuit's approach is particularly objectionable, as it not only ignores the statute's plain language, but also immunizes virtually every selling shareholder in every leveraged buyout transaction from the trustee's avoidance powers, thereby undermining one of the basic policy objectives of bankruptcy law without advancing any countervailing policy. Furthermore, the uncertain state of the law has given rise to commentators recommending the strategic use of financial intermediaries to take advantage of § 546(e) in the design of leveraged buyout transactions. Irving E. Walker, G. David Dean, *Structuring a Sale of Privately-held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am.Bankr.Inst.J., September 2009, at 16; *see also* Lisa M. Schweitzer and Luke A. Barefoot, *Protection for Shareholder Payments in LBOs Gone Bad: Recent Decisions Try to 'Settle' The Scope of § 546(e),* 242 N.Y.L.J., September 28, 2009 at col. 3.

The lack of predictability on this issue in our courts disrupts fundamental concepts of both bankruptcy and securities law, and is deserving of the definition that this Court can provide. Predictability on this issue is especially necessary at this momentous juncture in our national economic history when bankruptcy courts are tasked with sorting out failed financial ventures of unprecedented proportion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., *et al.*

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Dated: March 19, 2010

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2616

In re PLASSEIN INTERNATIONAL CORPORATION, f/k/a PL Liquidation Corp.,

Debtor

WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., et al.,

v.

B.A. CAPITAL CO. LP, ANDREW MARSHALL FORSBERG TRUST, ETHEL FORSBERG REVOCABLE TRUST, JANIS RAE FORSBERG TRUST, FRANK JOHN MCCARTHY, DANIEL R. ORRIS, BERNADINE ORRIS, CHARLES J. WARR, PAUL D. GAGE, STEPHEN S. WILSON, G. KENNETH POPE, JR., KENNETH OLENER, DANIEL A. JONES, III, SAM CHEBEIR, THOMAS F. FAY, RUTH L. FISCHBACH, MARK R. FREEDMAN, ROBERT N. ZEITLIN, SIDNEY ZEITLIN, ZFC ASSOCIATES, INC., WILLIAM G. RUSSELL, ROBERT N. ZEITLIN 1999 CHARITABLE REMAINDER UNITRUST

William Brandt,

Appellant

App. 2

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 1-07-cv-00345)
Honorable Joseph J. Farnan, Jr., District Judge

Argued November 2, 2009

BEFORE: SCIRICA, *Chief Judge*, and JORDAN and GREENBERG, *Circuit Judges*

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OPINION OF THE COURT

(Filed Dec. 22, 2009)

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

This matter comes on before this Court on appeal from a final order of the District Court entered on May 15, 2008, affirming an April 20, 2007 order of the Bankruptcy Court. This case originated in the Bankruptcy Court when William Brandt, the trustee in bankruptcy proceedings of Plassein International Corporation ("Plassein") and the subsidiaries it had acquired in related leveraged buyouts, brought an adversary proceeding seeking to recover the payments the shareholders of the acquired corporations had received for their shares on the grounds that the payments to them had been fraudulent transfers avoidable under Delaware Law and the Bankruptcy Code. The proceeding was unsuccessful because the

Court granted the shareholders' motions to dismiss, primarily on the basis of our opinion in *Lowenschuss v. Resorts Int'l, Inc.* (*In re Resorts Int'l, Inc.*), 181 F.3d 505, 509 (3d Cir. 1999) ("*Resorts*"). The trustee appealed to the District Court but that court affirmed the Bankruptcy Court order and, for the reasons that follow, we will affirm the order of the District Court.

II. BACKGROUND

Plassein was formed in 1999 to acquire several privately-held manufacturing corporations through leveraged buyouts. In a leveraged buyout, the purchaser funds the acquisition using borrowed money with the target company's assets usually being pledged as security for the loan after the acquisition is completed.

As planned, Plassein acquired several manufacturing corporations through leveraged buyouts in which, in accordance with an agreement with Plassein's lenders, each newly-acquired corporation pledged its assets as collateral for the loans to Plassein to finance the purchases. Furthermore, each acquired corporation agreed that it would be jointly and severally liable for *all* the funds that Plassein borrowed for *all* of the leveraged buyouts. As would be expected, this cross pledging of assets and assumptions of liability resulted in each acquired company having debts far exceeding its assets and thus, according to the trustee, the transactions rendered the acquired corporations insolvent.

Prior to the leveraged buyouts, all of the acquired companies had been privately-held with most having only a few shareholders. After agreeing to the buyouts, the selling shareholders delivered their shares to Plassein, which directed its bank (Fleet Bank) to wire funds to the shareholders' private accounts at their various banks to pay for the shares delivered. In these purchases the parties did not make use of the "settlement system" – the system of intermediaries and guarantees usually employed in securities transactions.[1]

A few months after the acquisitions, Plassein and the acquired companies began missing payments to the lenders that had provided Plassein with the funds for the buyouts. Eventually, Plassein and the acquired companies filed petitions seeking relief under Chapter 11 of the Bankruptcy Code but subsequently the bankruptcies were converted to Chapter 7 pro-

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[1] In the settlement system, a third-party clearing agency acts as an intermediary between an anonymous buyer and seller. The clearing agency, however, is more than just a conduit because it guarantees to the buyer and seller that the transaction will settle as agreed, an event normally occurring a few days after the trade is booked. This guarantee inspires confidence in the trading system and permits lightning-fast trading but it also subjects the clearing agency to possible liability if the transaction does not settle as agreed. For their part, the buyer and seller guarantee that they will deliver the money and securities as promised, even though they may be waiting to receive that property from some other party. *See generally Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230, 1238 n.4 (10th Cir. 1991).

ceedings and Brandt was appointed as trustee for their estates.

As we indicated at the outset of this opinion, in the adversary proceedings the trustee initiated against the selling shareholders of the acquired companies he contended that the buyout payments made to them in exchange for their privately-held stock were fraudulent transfers, avoidable by the trustee under Delaware law and 11 U.S.C. § 544. In their motions to dismiss the adversary proceedings the previous shareholders of the acquired companies argued that the payments could not be recovered because they were "settlement payments" made by or to a financial institution and thus were protected from avoidance by 11 U.S.C. § 546(e).[2] The Bankruptcy Court, relying primarily on our opinion in *Resorts*, agreed with the shareholders that the payments were exempt "settlement payments" under section 546(e), and thus the Court granted their motions to dismiss.[3] The trustee appealed to the

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[2] Even though the trustee contends that the transfers were fraudulent under Delaware law he does not contend that section 546(e) is limited to creating a safe harbor for transfers challenged as fraudulent under the Bankruptcy Code, though he does argue that, on the facts, section 546(e) is inapplicable here. In this regard we point out that section 546(e) is regularly applied when transfers are challenged as fraudulent under state law. Nevertheless, at least in theory, it might be possible to obtain different results in state and bankruptcy court proceedings seeking to avoid the same transaction as fraudulent.

[3] The Bankruptcy Court also concluded that it should dismiss the adversary proceeding because the trustee had failed to

(Continued on following page)

District Court, which affirmed the order of the Bankruptcy Court, and the trustee now appeals from the order of the District Court.

III. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Court had jurisdiction over the adversary proceeding under 28 U.S.C. § 157(b), and the District Court had jurisdiction to review the Bankruptcy Court's final decision under 28 U.S.C. § 158(a). We have jurisdiction to review the District Court's order under 28 U.S.C. § 158(d)(1). Inasmuch as the District Court was sitting as an appellate court, we essentially are reviewing the Bankruptcy Court's order of dismissal. *See Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.),* 145 F.3d 124, 131 (3d Cir. 1998). We exercise *de novo* review over orders granting motions to dismiss. *Id.*

IV. DISCUSSION

More than 20 years ago we held that leveraged buyouts in corporate acquisitions were subject to fraudulent transfer laws. *See United States v. Tabor Court Realty Corp.,* 803 F.2d 1288, 1297 (3d Cir. 1986). This treatment seemed appropriate because

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plead the elements of a claim for a fraudulent transfer but we do not address that holding on this appeal.

leveraged buyouts, in certain circumstances, can prejudice unsecured creditors of the acquired company by exchanging the equity in the acquired company for secured debt held by other creditors with priority over the claims of the unsecured creditors. *Id.*; *see also* Oscar N. Pinkas, *No Collateral and No Cash: Fraudulent Avoidance in Private Equity-Leveraged Buyouts,* Am. Bankr. Inst. J., Oct. 27, 2008, at 18. Accordingly, the use of a debtor's assets for security for a loan can impair the ability of unsecured creditors to recover their debts from the debtor. Therefore a reasonable argument can be made that, if possible, fraudulent transfer laws should not be applied to protect leveraged buyouts from being avoided as fraudulent transfers.

Nevertheless, we do not write on a blank slate when construing section 546(e) which shields certain settlement payments from a trustee's power to avoid a transfer as fraudulent. Indeed, in *Resorts,* as a result of our analysis of section 546(e), we concluded that the challenged transfer could not be avoided as a fraudulent transfer.[4] Other Courts of Appeals have followed our opinion in *Resorts. See, e.g., QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.),* 571 F.3d 545, 551 (6th Cir. 2009); *Contemporary Indus. Corp.*

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[4] Congress has amended section 546(e) since we decided *Resorts* but we are not concerned with when the amendments became effective because at the time of *Resorts*, and now, the section shielded settlement payments to financial institutions. This case focuses on the use of that shield.

v. Frost, 564 F.3d 981, 985-86 (8th Cir. 2009); *see also* Lisa G. Beckerman & Robert J. Stark, *LBOs and Fraudulent Conveyances: The Third Circuit Does an About Face,* 2 Norton Bankr. L. Adviser 1 (2000) (noting our "watershed" ruling).

A. "Settlement Payments" and Our Opinion In *Resorts*

Resorts dealt with Resorts International, Inc., a publicly-traded corporation that had been purchased in a leveraged buyout. One shareholder, Fred Lowenschuss, initially refused the buyout offer of $36 per share and demanded a judicial appraisal of his shares to establish the price for their purchase. He subsequently changed his mind about seeking an appraisal as he later filed a petition in the District Court requesting payment of $36 per share in exchange for the immediate tender of his shares. Lowenschuss delivered his shares to his broker (Merrill Lynch) who tendered the shares to Resorts International's transfer agent (Chase Manhattan Bank). When Chase Manhattan informed Resorts International of Lowenschuss's tender, Resorts International's treasurer directed Chase Manhattan to pay Lowenschuss the $36 per share that Lowenschuss sought. Consequently, Chase Manhattan Bank sent a check to Merrill Lynch for $36 per share and Merrill Lynch, in turn, paid the funds to Lowenschuss.

Resorts International subsequently realized that it had paid Lowenschuss the full merger price instead

of the lower price it hoped to win in the appraisal proceeding from the court. Therefore Resorts International initiated a suit to recover the payment, but before the suit was complete Resorts International filed a petition in bankruptcy. In the bankruptcy court, the trustee sought to avoid the payment as a fraudulent transfer.[5] Lowenschuss argued that the payment to him could not be avoided because he had received his funds through a settlement payment and section 546(e), the provision at issue in this case, provides that a trustee may not avoid a transfer made as a "settlement payment" by or to a financial institution.

In *Resorts* we focused on the final clause of the definition of "settlement payment" in 11 U.S.C. § 741(8) which defines "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." We were concerned in *Resorts* with whether the payment to Lowenschuss involved "any other similar payment commonly used in the securities trade." In our opinion, we cited several district court opinions that excluded leveraged buyout payments from the definition of "settlement payment" as those courts reasoned that the payments did not

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[5] The trustee advanced other bases for recovering the payment to Lowenschuss but we need not discuss them.

use the system of intermediaries and guarantees that normal public-securities transactions employ. *Resorts*, 181 F.3d at 515 (citing *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 675-76 (D.R.I. 1998); *Wieboldt Stores, Inc. v. Schottenstein*, 131 B.R. 655, 664-65 (N.D. Ill. 1991)).

In *Resorts* we also reviewed an opinion of the Court of Appeals for the Eleventh Circuit holding that a financial institution was not "involved" in a leveraged buyout payment because a bank did not acquire a beneficial interest in the shares being exchanged; rather the banks were merely acting as conduits. *Id.* at 516 (citing *Munford v. Valuation Research Corp.*, 98 F.3d 604, 610 (11th Cir. 1996)). The court's approach in *Munford* was clearly a different way of expressing the same position as the district courts whose opinions we had cited in *Resorts* when they excluded leveraged buyouts payments from the definition "settlement payments" – namely, that "settlement payments" must travel through the system of intermediaries and guarantees that normal securities transactions employ. In *Resorts* we recognized that a clearing agency had not been involved in the settlement for Lowenschuss's shares and that the financial institutions involved acted only as conduits.

In view of our recognition of the limited role of the financial institutions in *Resorts*, if we had accepted the view of the Court of Appeals for the Eleventh Circuit in *Munford* and the several district court opinions that we cite above, we would have concluded that the payment to Lowenschuss was not

a "settlement payment," safe from being avoided as a fraudulent transfer, but we rejected the courts' reasoning. Instead we held that the definition of "settlement payment" was broad and that in the securities trade, "a settlement payment is generally the transfer of cash or securities made to complete a transfer payment." *Id.* at 515 (citing *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990) (relying on several industry texts)). We concluded, "[a] payment for shares during [a leveraged buyout] is obviously a common securities transaction, and we therefore hold that it is also a settlement payment" for the purposes of section 546(e). *Id.* at 516. Based on this conclusion, we dismissed the adversary proceeding against Lowenschuss.

B. Distinguishing Privately-Traded Shares from Publicly-Traded Shares

Though *Resorts* seemingly should be determinative here because Fleet Bank transferred the buyout funds to the shareholders' banks and thus financial institutions were implicated in the transfers, the trustee argues that *Resorts* should not control our outcome because Resorts International was a publicly-traded company while Plassein only acquired privately-held companies. Moreover, the trustee argues that our opinion in *Resorts* took too wide a scope in considering the meaning of the phrase "the securities trade." The trustee argues that the "securities trade" refers to "the industry dealing in

publicly-traded securities . . . and naturally refers only to the 'business of buying and selling' *publicly-traded* securities." Appellant's Br. at 18 (emphasis in original). Thus, the trustee is arguing that the meaning of "settlement payment" is limited to payments made for securities in the *actual* public securities market. In contrast, however, in *Resorts* we concluded that the meaning of "settlement payment" is best understood by examining how the term is used by those who work in the public securities market.

The trustee argues that *Resorts* did not consider the arguments he advances here and therefore we are not bound by that case, but we think that *Resorts* implicitly rejected the trustee's contentions advanced in this case. Certainly *Resorts* expressly rejected the argument that "settlement payments" must travel through the settlement system. Though it is true that Resorts International was a publicly-traded company whose shares when traded and the payment for them normally traveled through the settlement system, that circumstance had no bearing on our decision in *Resorts.* Lowenschuss sold his shares to Resorts International in a transaction outside of the publicly traded securities settlement system. *See supra* note 1 (describing the settlement system). If in determining what type of transaction constituted a settlement payment we had applied the definition the trustee advances here, we would have found that the shares in *Resorts,* as they were *actually traded in that case,* were not part of the "industry dealing in publicly-traded securities" but we did not do so. Instead, in

Resorts we explored the meaning of "settlement payment" by examining how that term is used by those who work in the securities trade, and recognized that persons who work in the securities trade use the term "settlement payment" when referring to the payment that completes a leveraged buyout. Cf. *QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545, 549-50 (6th Cir. 2009) (citing to Resorts and Contemporary Industries and holding that "[t]he value of the privately held securities at issue is substantial and there is no reason to think that unwinding that settlement would have any less of an impact on financial markets than publicly traded securities"); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986 (8th Cir. 2009) (citing *Resorts* and holding that "[n]othing in the relevant statutory language suggests Congress intended to exclude these payments from the statutory definition of 'settlement payment' simply because the stock at issue was privately held").

For these reasons, we reject the trustee's attempt to distinguish *Resorts*. We will not ignore the plain language in that case which governs the present dispute. If we accepted the trustee's distinction, we would, at a minimum, be calling *Resorts* into serious question. But in this Court, a panel will not reject the clear holding of a previous panel. See 3rd Cir.

Internal Operating P. 9.1; *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610-11 (3d Cir. 2002).[6]

V. CONCLUSION

Because we conclude that our opinion in *Resorts* directly controls the outcome in this case, we will affirm the District Court's order of May 15, 2008, affirming the Bankruptcy Court's order of April 20, 2007.

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[6] The defendant shareholders also contend that the trustee's complaint fails to state a claim for fraudulent transfer under §§ 1304 and 1305 of Delaware's Uniform Fraudulent Transfer Act, Del. Code Ann. tit. 6, § 1301 *et seq.* (2005), but, because we have concluded that section 546(e) bars the trustee's action, we need not address that additional argument.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2616

In re: PLASSEIN INTERNATIONAL CORPORATION, f/k/a PL Liquidation Corp,

Debtor

WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., et al.,

v.

B.A. CAPITAL CO. LP, ANDREW MARSHALL FORSBERG TRUST, ETHEL FORSBERG REVOCABLE TRUST, JANIS RAE FORSBERG TRUST, FRANK JOHN MCCARTHY, DANIEL R. ORRIS, BERNADINE ORRIS, CHARLES J. WARR, PAUL D. GAGE, STEPHEN S. WILSON, G. KENNETH POPE, JR., KENNETH OLENER, DANIEL A. JONES, III, SAM CHEBEIR, THOMAS F. FAY, RUTH L. FISCHBACH, MARK R. FREEDMAN, ROBERT N. ZEITLIN, SIDNEY ZEITLIN, ZFC ASSOCIATES, INC., WILLIAM G. RUSSELL, ROBERT N. ZEITLIN 1999 CHARITABLE REMAINDER UNITRUST,

William Brandt,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 1-07-cv-00345)
Honorable Joseph J. Farnan, Jr., District Judge

Argued November 2, 2009

BEFORE: SCIRICA, *Chief Judge*, and
JORDAN and GREENBERG, *Circuit Judges*

JUDGMENT

(Filed Dec. 22, 2009)

This case having come on to be considered on the record on an appeal from the United States District Court for the District of Delaware and being argued on November 2, 2009;

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the order of the District Court dated May 15, 2008, is affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 22 December 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	: Chapter 7
PLASSEIN INTERNATIONAL CORP., et al., (n/k/a PL Liquidation Corp.),	: Case No. 03-14489-KG
	: Jointly Administered
Debtors.	: Adv. Proc. No. 05-50692-KG
WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., et al.,	:
Appellant,	: Civil Action No. 07-345-JJF
v.	:
B.A. CAPITAL COMPANY LP, et al.,	:
Appellees.	:

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MEMORANDUM OPINION

May 15, 2008
Wilmington, Delaware

/s/ Joseph J. Farnan, J.
Farnan, District Judge

Pending before the Court is an appeal from the April 20, 2007 Order of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") dismissing the underlying adversary appeal filed by the Chapter 7 Trustee, William Brandt (the "Trustee"), against Appellees here, the selling shareholders, seeking to avoid the transfers made to Appellees as alleged fraudulent conveyances pursuant to 11 U.S.C. § 544 and Delaware law. For the reasons discussed, the Court will affirm the Bankruptcy Court's Order.

I. THE PARTIES' CONTENTIONS

On behalf of the Debtors, Plassein International Corp. and its associated entities, the Trustee filed the adversary proceeding underlying this appeal alleging that a series of avoidable fraudulent transfers rendered the Debtors insolvent or with unreasonably small capital for their businesses. Upon motion of the selling shareholder defendants, the Bankruptcy Court dismissed the adversary complaint concluding that the transfers in question were "settlement payments" within the meaning of Section 546(e) of the Bankruptcy Code, and therefore, not subject to avoidance

under 11 U.S.C. § 544(b). The Bankruptcy Court also concluded that the Adversary Complaint failed to state a claim upon which relief could be granted. In this regard, the Bankruptcy Court concluded that the Trustee could not state a claim under 6 Del. C. §§ 1304 and 1305, because the Adversary Complaint did not allege that Plassein or any of its related Debtors made the transfer. Instead, the transfer was made by a non-debtor entity, Plassein Packaging Corporation ("Plassein Packaging"), and the Bankruptcy Court further concluded that the allegations of the Adversary Complaint could not be collapsed, because intent to defraud was not alleged.

By its appeal, the Trustee contends that the Bankruptcy Court erred in applying Section 546(e) to the transfers in this case. Specifically, the Trustee contends that Section 546(e) is limited to publicly traded securities. The Trustee also contends that the Bankruptcy Court erred in holding that actual intent to defraud was required to collapse the transactions. The Trustee further argues that the record establishes that a debtor, Plassein International Corporation, was known as Plassein Packaging, and therefore, a debtor did effectuate the transfer as required under Delaware law.

Although several Appellees filed separate briefs, their arguments are essentially the same. Appellees contend that under the plain language of Section 546(e) and Third Circuit case law, particularly the decision in *In re Resorts Intl., Inc.*, 181 F.3d 505 (3d Cir. 1999), Section 546(e) is not limited to publicly

traded securities. Appellees further contend that Third Circuit case law requires proof of intent to defraud or bad faith to collapse otherwise separate transactions. Appellees also contend that the Adversary Complaint fails to allege that the transferor, Plassein Packaging, was a debtor and that deficiency cannot be corrected by allegations in the Trustee's motion papers that Plassein International and Plassein Packaging are the same entity or by weeding through exhibits to the Adversary Complaint purportedly suggesting the same.

II. STANDARD OF REVIEW

The Court has jurisdiction to hear an appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the Court applies a clearly erroneous standard to the Bankruptcy Court's findings of fact and a plenary standard to its legal conclusions. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the Court must accept the Bankruptcy Court's finding of "historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)). The appellate responsibilities of the Court are further understood by the jurisdiction

exercised by the Third Circuit, which reviews the Bankruptcy Court decision on a *de novo* basis in the first instance. *In re Telegroup,* 281 F.3d 133, 136 (3d Cir. 2002).

III. DISCUSSION

Reviewing the legal conclusions of the Bankruptcy Court under the *de novo* standard of review, the Court concludes that the Bankruptcy Court did not err in dismissing the Adversary Complaint underlying this appeal. In *Resorts Int'l,* 181 F.3d at 515-516, the Third Circuit, consistent with the plain language of Section 546(e), adopted a broad approach to the term "settlement payment," and the Court finds nothing in the *Resorts* case or any other Third Circuit case law supporting the Trustee's contention that the term should be limited to publicly traded securities. The cases cited by the Trustee for a contrary proposition are not binding in this Circuit.

The Court likewise concludes that the Bankruptcy Court did not err in dismissing the Adversary Complaint for failure to state a claim. Appellants contend that the Bankruptcy Court should have looked to the public record to determine that Plassein International and Plassein Packaging are one in the same. As a threshold matter, however, no such allegation is pled in the Adversary Complaint, and this initial pleading deficiency cannot be cured by statements made by the Trustee in its briefing or by way of supplemental affidavits. *See e.g., Frederico v. Home*

Depot, 507 F.3d 188, 201-202 (3d Cir. 2007) ("[W]e do not consider after-the-fact allegations in determining the sufficiency of her complaint under Rules 9(b) and 12(b)(6)") (citations omitted). Given this threshold pleading deficiency, the Court cannot conclude that the Bankruptcy Court erred in failing to consult the public record. Further, the Court agrees with the Bankruptcy Court that the allegations of the Adversary Complaint do not support collapsing the transactions. As the Bankruptcy Court noted, courts in this Circuit have typically required proof of bad faith or intent to defraud to justify collapsing otherwise independent transactions. *See e.g. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.,* 919 F.2d 206 (3d Cir. 1990); *U.S. v. Tabor Court Realty,* 803 F.2d 1288 (3d Cir. 1986); *In re National Forge Co.,* 344 B.R. 340, 347 (W.D. Pa. 2006). In this case, the Adversary Complaint does not allege bad faith or intent to defraud, and therefore, the Court cannot conclude that the Bankruptcy Court erred in dismissing it.

IV. CONCLUSION

For the reasons discussed, the Court will affirm the Bankruptcy Court's April 20, 2007 Order.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	Chapter 7
PLASSEIN INTERNATIONAL CORP., et al., (n/k/a PL Liquidation Corp.),	Case No. 03-14489-KG
	Jointly Administered
	Adv. Proc. No. 05-50692-KG
Debtors.	
WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., et al.,	
Appellant,	Civil Action No. 07-345-JJF
v.	
B.A. CAPITAL COMPANY LP, et al.,	
Appellees.	

FINAL ORDER

At Wilmington, this 15 day of May 2008, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that April 20, 2007 Order of the Bankruptcy Court is ***AFFIRMED***.

/s/ Joseph J. Farnan, J.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	Chapter 7
Plassein International Corporation, *et al.*, (n/k/a PL Liquidation Corp.), Debtors.	Case No. 03-11489 (KG) Jointly Administered
WILLIAM BRANDT, as he is the Trustee of the Estates of Plassein International Corp., *et al.*, Plaintiff, v. B.A. Capital Company LP, *et al.*, Defendants.	Adversary Proceeding Number A 05-50692 (KG) Related Document Nos: 22, 23, 25, 26, 27, 28, 29, 30, 31, 37, 43, 44, 45, 46, 47

OPINION[1]

INTRODUCTION

In January and August, 2000, Plassein International Corporation ("Plassein" or "Debtors") acquired five privately held corporations by purchasing the shares of the companies' respective shareholders. The Chapter 7 trustee, William Brandt ("the

[1] This Opinion constitutes the findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Trustee") has brought suit against the selling shareholders who are named defendants ("the Shareholders" or "Defendants") (see pp. 4-5 *infra*) seeking to avoid the transfers made to the Shareholders, claiming they were fraudulent conveyances pursuant to 11 U.S.C. § 544 and applicable Delaware law.

Before the Court are Motions to Dismiss the Complaint ("the Motions") filed by the Shareholders pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012(b). The Motions are based upon the same grounds and, therefore, for efficiency and because the Motions are essentially identical, the Court will deal with the Motions together. First, Defendants argue that the Trustee alleges in the Complaint that a non-debtor made the transfers and the applicable statute requires that a debtor make the transfers for a cause of action to exist. Secondly, Defendants argue that because the payments they received were payments on account of a securities transaction made by wire transfers from a financial institution, the transfers were "settlement payments" and thereby exempt from avoidance pursuant to 11 U.S.C. § 546(e).

JURISDICTION

The Court's jurisdiction rests upon 28 U.S.C. §§ 157 and 1334. The adversary proceeding is a core matter under 28 U.S.C. § 157(b)(2); and venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTS

Debtor Plassein International Corporation[2] was formed in 1999 to acquire several privately held manufacturers of flexible packaging and specialty film ("the Target Companies"). (Complaint ¶ 27) Plassein made the acquisitions through a series of leveraged buyouts ("LBO") whereby a group of lenders advanced funds and extended credit to Packaging in exchange for security interests in the Target Companies' assets and promises by the Target Companies to repay the loans. Packaging then used those funds to acquire the stock of the Target Companies and to pay off the Target Companies' existing secured debt. (Compl. ¶¶ 32-34 and 49.) The Target Companies were each privately owned companies (Compl. ¶ 27) and, as such, their stock was not traded in the public securities markets. The Target Companies were not merged into Plassein but changed their names and continued to operate as separate entities.

The LBO transactions proceeded in two phases. In the first phase on January 10, 2000, Packaging closed on acquisitions of the stock of: (a) Plastical Industries, Inc. ("Plastical," n/k/a Plassein International of Spartanburg, Inc.); (b) Nor Baker Industries, Ltd.

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[2] References to Plassein in the transactions at issue are for convenience. In the Complaint, debtors refer to Plassein as the acquiror. In fact, the closing documents show clearly that it was Plassein Packaging Corporation ("Packaging") which participated in the closings of the acquisitions and whose funds Fleet Bank wired.

("Nor Baker," now in liquidation in Canada); (c) Marshall Plastics Film, Inc. ("Marshall," n/k/a Plassein International of Martin, Inc.); and (d) Key Packaging Industries Corp. ("Key," n/k/a Plassein International of Salem, Inc.). Plassein purchased the assets of Transamerican Plastic LLC ("Transamerican," n/k/a Plassein International of Ontario, Inc.). Following these acquisitions, the Target Companies purchased in the first phase became jointly and severally liable for the entire debt incurred to finance the transactions, and all granted a security interest in all of their assets to secure that debt. (Compl. ¶ 33.)

In the second phase, on August 15, 2000, Packaging acquired the stock of Rex International, Inc. ("Rex," n/k/a Plassein International of Thomasville, Inc.). Following the Rex transaction, Rex became liable not only for the debt incurred in the course of Plassein's acquisition of the Rex stock, but also for the January Acquisitions. (Compl. ¶ 48.) Thus, the Target Companies were jointly and severally liable for the entire debt incurred in the acquisitions.

Plassein alleges that the Shareholders received a substantial premium for their shares, which was accounted for on the post-closing balance sheets as "goodwill." (Compl. ¶¶ 45 and 57.) Plassein further claims that each transaction rendered each acquired company insolvent, in that, the sum of their debts was greater than the value of their assets at fair valuation. (Compl. ¶¶ 46 and 58-61.)

The Complaint contains the details of the transfers from Packaging to the Shareholders as follows:

a. To the Shareholders of Key:

Thomas F. Fay	$2,829,179.34
Ruth L. Fishback	$2,706,414.19
Mark R. Freedman	$69,403.19
Robert N. Zeitlin	$2,188,122.12
Sidney Zeitlin	$3,571,664.30
ZFC Associates Inc.	$140,727.42
William G. Russell	$19,141.09
Robert N. Zeitlin 1999 Charitable Remainder Unitrust	$518,426.87
Total	$12,043,078.52

b. To the Shareholders of Marshall

The Andrew Marshall Forsberg Trust	$1,016,252.90
Ethel Forsberg Revocable Trust	$2,286,569.02
Janis Rae Forsberg Trust	$484,244.51
Frank John McCarthy	$1,270,316.12
Daniel R. Orris	$41,177.17
Bernadine Orris	$41,177.15
Total:	$5,098,559.72

c. To the Shareholders of Plastical/Transamerican:

Sam Chebeir	$2,046,364.39

d. To the Shareholders of Rex:

B.A. Capital Company LP	$25,491,779.76
Heller Financial, Inc	$2,347,382.00
Charles J. Warr	$366,477.36
Paul D. Gage	$1,522,317.98
Stephen S. Wilson	$1,522,317.98
G. Kenneth Pope Jr.	$171,507.67
Kenneth Olenler	$285,786.68
Daniel A. Jones III	$171,507.67
Total	$31,934,274.06

(Compl., ¶ 40, Exhibit B.)

The Trustee's records of the transfers at issue confirm that non-debtor Packaging, and not Plassein or any of Debtors, made the transfers to the Shareholders. (Compl., Ex. B.) The records also indicate that Fleet Bank transferred the funds by wire. (*Id.*)

Plassein and the Target Companies filed Chapter 11 bankruptcy petitions on May 14, 2003, and Nor Baker commenced an insolvency proceeding in Canada on the same date. Following the conversions of the cases to Chapter 7, William Brandt was appointed trustee of Debtors' estates on February 6, 2004.

THE PARTIES' POSITIONS

A. The Trustee's Claims

The Trustee's case against the Shareholders, at its essence, is that in acquiring the Shareholders' stock in the Target Companies, Plassein and the other Debtors were rendered insolvent and did not receive reasonably equivalent value in the acquisitions. Thus, the Trustee seeks to avoid the transfers to the Shareholders as fraudulent transfers pursuant to the Bankruptcy Code, 11 U.S.C. § 544, and Delaware law, 6 Del. C. §§ 1304 and 1305.

B. The Shareholders' Defenses

The Shareholders raise two separate defenses.[3] First, under Delaware law, it is the debtor that must make the transfer to establish a fraudulent conveyance; and Plassein Packaging Corp., who made the transfers, was not a debtor. Second, under the Bankruptcy Code, 11 U.S.C. § 546(e), the transfers are exempt from avoidance because they qualify as settlement payments by a financial institution.

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[3] The Shareholders also argue in their Motions to Dismiss that the transfers did not render Debtors insolvent. The issue of insolvency is highly factual and may not be appropriate for decision at this early stage of the case. The Court will not, and need not, decide whether or not the transfers rendered debtors insolvent.

DECISION

A. Legal Standard for Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b)(6), tests the sufficiency of the complaint. *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir. 1993). In deciding a motion to dismiss, the Court accepts as true all allegations in the complaint and all reasonable inferences drawn from it are considered in the light most favorable to the plaintiff. *Morse v. Lower Merion School District,* 132 F.3d 902, 905 (3d Cir. 1997). A motion to dismiss should be granted when it is clear that under any possible set of facts alleged in the complaint, the plaintiff would still not be entitled to judgment. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Official Committee of Unsecured Creditors v. Fleet Retail Finance Group (In re Hechinger Investment Company of Delaware),* 274 B.R. 71, 80 (D.Del. 2002) (dismissing portions of a complaint for failure to state a claim because the transfers in question were settlement payments and were not fraudulent).

B. The Transfers to the Defendants are Settlement Payments, Not Subject to Avoidance

The Trustee alleges that the underlying transfers/payments from Packaging to Defendants for their stock were made by wire transfer through Fleet Bank. The Court finds that the transfers are "settlement payments" within the meaning of section 546(e)

of the Bankruptcy Code and therefore, are not subject to avoidance.

Section 544(b) of the Bankruptcy Code authorizes the Trustee to "avoid any transfer of interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b). Section 546(e), however, provides that, notwithstanding section 544, "the trustee may not avoid a transfer that is a . . . settlement payment, as defined by section 101 or 741 of [the Bankruptcy Code], made by or to a . . . financial institution." 11 U.S.C. § 546(e).

A "settlement payment" is defined under section 741(8) of the Bankruptcy Code to include "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). Put simply, "a settlement payment is generally the transfer of cash or securities made to complete a securities transaction." *Lowenschuss v. Resorts International, Inc. (In re Resorts International, Inc.),* 181 F.3d 505, 515 (3d Cir. 1999). The Court of Appeals for the Third Circuit has repeatedly held that this definition is "extremely broad" and encompasses almost all securities transactions. *In re Resorts International,* 181 F.3d at 515 (quoting *Bevill, Bresler & Schulman Asset Management Corporation v. Spencer Savings & Loan Association,* 878 F.2d 742, 751 (3d Cir. 1989)). In *Resorts,* the Court of Appeals held that payment to a shareholder

for his shares as part of a leveraged buyout was "obviously a common securities transaction" and, therefore, a settlement payment under section 546(e). *In re Resorts International,* 181 F.3d at 516; *see also Hechinger,* 274 B.R. at 87 (applying *Resorts* and holding that payment for shares of stock was an unavoidable settlement payment).

The second prong of section 546(e) requires that payment for the securities must be made by or to a financial institution. "So long as a financial institution is involved, the payment is an unavoidable 'settlement payment.'" *Hechinger,* 274 B.R. at 87. The term "financial institution" is defined under the Bankruptcy Code as "a Federal Reserve bank or an entity that is a commercial or savings bank . . . when any such Federal Reserve bank . . . or entity is acting as agent or custodian for a customer . . . in connection with a securities contract." 11 U.S.C. § 101(22)(A). This requirement is satisfied when a leveraged buyout payment is made by wire transfer. *In re Resorts International,* 181 F.3d. at 515. Indeed, federal regulations require that a wire transfer *must* be performed by a bank; thus, a wire transfer must be made through a financial institution. *See In re Loranger Mfg. Corp.,* 324 B.R. 575 (Bankr.W.D.Pa. 2005) (taking judicial notice of federal regulation requiring that a wire transfer must be accomplished by a bank, rejecting plaintiff's arguments that bank's involvement was "mere facilitation" and holding that debtor's leveraged buyout of defendant's shares was a

"settlement payment" under § 546(e) because payment was made by wire transfer).

The transactions between Defendants and Packaging are indistinguishable from the stock purchases held to be unavoidable settlement payments in *Resorts*. In *Resorts*, Resorts' shares were purchased by Griffco Acquisition Corporation in an LBO. Resorts erroneously authorized a wire transfer to be paid to a shareholder through Chase Manhattan Bank. Resorts later filed for Chapter 11 bankruptcy protection, and the Trustee sought to recover the funds as an avoidable transfer. The shareholder argued that the wire transfer was a "settlement payment" and therefore unavoidable under § 546(e). The Court of Appeals looked to the plain language of the statute and held that the payment for the shares was a settlement payment for the purposes of section 546(e), and therefore not avoidable. *In re Resorts International*, 181 F.3d at 515-516.

Here, there is no dispute that the payments to the Shareholders were made by Fleet Bank, a financial institution, to other financial institutions in order to settle securities transactions, namely, Packaging's purchase of stock of the Target Companies. *Resorts* dispels any doubt that the transfers to the Shareholders were settlement payments. In the securities industry, a settlement payment is generally the transfer of cash or securities made to complete a securities transaction. *Id.* at 515. Accordingly, section 546(e) applies to the transactions at issue and the

wire transfers executed by Fleet Bank are unavoidable.

However, the Trustee endeavors to limit the application of *Resorts* to publicly traded securities. The Trustee argues that Section 546(e) was enacted for protecting the operation of the security industry's clearance and settlement system which operates only with respect to securities that are publicly traded. The Trustee thus argues that section 546(e) applies only to publicly traded securities. The Trustee relies on two cases in support of his argument, *Zahn v. Yucaipa Capital Fund,* 218 B.R. 656 (D.R.I. 1998) and *Wieboldt Stores, Inc. v. Schottenstein,* 131 B.R. 655 (N.D. Ill. 1991). *Zahn* and *Wieboldt Stores* both held that LBO payments were not covered by section 546(e) because "'the system of intermediaries and guarantees' that normal securities transactions involve is not in play in an LBO." *In re Resorts International,* 181 F.3d at 515 (citing *Zahn*, 218 B.R. at 676).

The Trustee's argument, however, was expressly rejected by *Resorts*. "Although no clearing agency was involved in this transfer, two financial institutions – Merrill Lynch and Chase – were. Under a literal reading of section 546(e), therefore, this was a settlement payment 'made by . . . a financial institution.'" *In re Resorts International,* 181 F.3d at 515 (quoting 11 U.S.C. § 546(e)). The *Resorts* Court considered and rejected *Zahn* and *Wieboldt Stores*, holding that the plain language of the statute trumped extraneous

considerations, and concluding that "the term 'settlement payment' is a broad one that includes almost all securities transactions." *In re Resorts International,* 181 F.3d at 515-516.

Furthermore, the Trustee does not point the Court to any Third Circuit decision that limits application of *Resorts* to public companies. However, the *Resorts* Court relied on *In re Kaiser Steel Corporation,* 952 F.2d 1230 (10th Cir. 1991), that held that the term "settlement payment" applied to a repurchase agreement, which was found not to be "a 'trade' entered into on an exchange." *Kaiser Steel,* 952 F.2d at 1239. The Court in *Resorts* acknowledged that commentators were critical of *Kaiser Steel* for applying section 546 to a transaction involving an LBO because it did not involve the public trading system and thus did not reflect Congressional intent. *In re Resorts International,* 181 F.3d at 516, n.10. However, the Court of Appeals held firm that the plain language of the statute mandated the "logical conclusion" that the section 546(e) exemption extends to all securities transactions, whether the securities at issue are publicly traded or are securities traded outside the public trading system. *Id.*

More recent case law within the Third Circuit follows the *Resorts* analysis. *See In re Loranger Mfg. Corp.,* 324 B.R. 575, 584-85 (Bankr.W.D.Pa. 2005) (holding that $9 million payment to defendant in a leveraged buyout for shares that were not publicly traded was unavoidable under section 546(e)); *Official Committee of Unsecured Creditors of The IT*

Group v. Acres of Diamonds, L.P., (In re The IT Group, Inc.), 2006 WL 3833933 (Bankr. D.Del. 2006). In *The IT Group,* the post-confirmation trust sued to avoid and recover a fraudulent conveyance in the amount of $575,000 for the purchase of stock in a privately held company. In granting summary judgment and finding the transaction was not avoidable, the Court unequivocally held that "the term settlement payment is to be applied broadly to any transfer of stock or cash to pay for stock." *Id.* at *4. Chief Judge Walrath applied the settlement payment exemption to privately held securities even though the transaction did not involve a true financial intermediary or securities clearing agency, finding that:

> Although this case does not involve a leveraged buyout, publicly traded stock, or a clearing agency, the Third Circuit's holding in *Resorts* mandates a conclusion that section 546(e) is broad enough to protect from avoidance a "settlement payment . . . made by . . . [a] financial institution."

Id. (citations omitted).

It is therefore certain that Defendants have met all of the requirements for the section 546(e) safe harbor from fraudulent transfer liability. The broad application of what constitutes a settlement payment mandated in *Resorts* covers even transactions which, as here, are LBO purchases of non-public securities. *Id.*

C. The Complaint Fails to State a Claim for Fraudulent Conveyance

The Trustee's claims against Defendants are also based upon sections 1304 and 1305 of the Delaware Code, which are applicable to this proceeding pursuant to section 544 of the Bankruptcy Code.

Section 1304 of the Delaware Code provides in relevant part,

> (A) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> * * *
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

6 Del.C. § 1304. Section 1305 of the Delaware Code provides in relevant part,

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

6 Del.C. § 1305. Thus, in order to state a claim under section 1304 and 1305, the Trustee must allege that (i) the debtor made a transfer (ii) for less than reasonably equivalent value and (iii) the debtor was, or was rendered, insolvent thereby.

The Complaint fails to state a claim for avoidance of a fraudulent conveyance because the Trustee does not allege that either Plassein or any other Debtor made any transfers to the Shareholders. Instead the Trustee asserts that Packaging, a non-debtor, through Fleet Bank, paid for the shares of the Target Companies. Since no Debtor made a transfer, there is no legal basis for any fraudulent conveyance claim.

The Trustee seeks to avoid the implications that Packaging is not a debtor by arguing that the transactions are a single integrated plan and there is authority to "collapse" the transaction to determine fraudulent conveyance liability. *See, e.g., Hechinger,* 274 B.R. at 91.

The Court agrees with Defendants that the allegations contained within the Complaint do not serve as a basis for collapsing the transactions. Absent proof of intent to defraud, independent transactions will not be collapsed. *Compare, e.g., U.S. v. Gleneagles Investment Co., Inc.*, 565 F.Supp. 556 (M.D. Pa. 1983); 571 F.Supp. 935 (M.D. Pa. 1983); 584 F.Supp. 671 (M.D. Pa. 1984); aff'd sub nom, *U.S. v. Tabor Court Realty Corporation*, 803 F.2d 1288 (3d Cir. 1986) (sustaining collapse of various transactions where parties acted in bad faith); *Voest-Alpine Trading USA Corporation v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990) (upholding finding that several transactions at the same time were a single integrated transaction that functioned as a subterfuge and damaged unsecured creditors).

The Complaint does not allege fraud or bad faith, and at oral argument, the Trustee conceded he is not claiming actual fraud. The Complaint also does not allege any relationship whatsoever among the transactions or the Shareholders. Moreover, there are no allegations calling into question the good faith of the Shareholders.

CONCLUSION

The *Resorts* decision stands firmly between the Trustee and the successful prosecution of the alleged fraudulent conveyance claims. The Trustee concedes that *Resorts* controls the outcome of the pending motion to dismiss. *Resorts*, in turn, has been extended

in cases such as *Loranger* and *The IT Group*. All of these cases clearly establish that the transfers at issue are exempt from avoidance under section 544 of the Bankruptcy Code. Therefore, the Court will **GRANT** the Motions to Dismiss.

An appropriate Order follows.

Dated: April 20, 2007

/s/ Kevin Gross
Kevin Gross
United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: Plassein International Corporation, et al., Debtors.	)	Case No. 03-11489(KG) (Jointly Administered)
WILLIAM BRANDT, AS HE IS THE TRUSTEE OF THE ESTATES OF PLASSEIN INTERNATIONAL CORP., et al., Plaintiff, v. B.A. CAPITAL COMPANY LP, THOMAS F. FAY, RUTH L. FISCHBACH, MARK R. FREEDMAN, ROBERT N. ZEITLIN, SIDNEY ZEITLIN, ZFC ASSOCIATES, INC., WILLIAM G. RUSSELL, ROBERT N. ZEITLIN 1999 CHARITABLE REMAINDER UNITRUST, THE ANDREW MARSHALL FORSBERG TRUST, ETHEL FORSBERG REVOCABLE TRUST, JANIS RAE FORSBERG TRUST, FRANK JOHN MCCARTHY, DANIEL R. ORRIS, BERNADINE ORRIS, SAM CHEBEIR, CHARLES J. WARR, PAUL D. GAGE, STEPHEN S. WILSON, G. KENNETH POPE, JR., KENNETH OLENLER, and DANIEL A. JONES, III, Defendants.	)	Adv. Proc. No. 05-50692 (KG)

ORDER

AND NOW, this 20th day of April, 2007, after consideration of the defendant's [sic] motions for dismissal of the plaintiffs' adversary complaint against them, for the reasons set forth in the accompanying Opinion of even date, it is hereby,

ORDERED that the adversary proceeding is dismissed.

/s/ Kevin Gross
Kevin Gross
United States
Bankruptcy Judge

cc: Robert J. Stearn, Jr., Esquire
Laurie Schenker Polleck, Esquire
Laurie Selber Silverstein, Esquire
Ricardo Palacio, Esquire
Richard H. Cross, Jr., Esquire